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Supreme Court of the United States

OCTOBER TERM 1932.

No. 496.

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

against

ERNEST BROOKS, HAROLD WILSON BROOKS and WALTER DOUGLAS BROOKS, as Executors of the Last Will and Testament of Ernest Augustus Brooks, deceased,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

CHARLES ANGULO,
RUSSELL L. BRADFORD,
Counsel for CITY BANK FARMERS TRUST COMPANY, as Ancillary Executor as aforesaid, *Amici Curiae.*

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MAY IT PLEASE THE COURT:

The undersigned as counsel for City Bank Farmers Trust Company of New York, as ancillary executor of the Last Will and Testament of Urban Hanlon Broughton, late of England, deceased, respectfully move this Honorable Court for leave to file the accompanying brief in this case, as *amici curiae.*

CHARLES ANGULO,
RUSSELL L. BRADFORD,
Counsel for CITY BANK FARMERS TRUST COMPANY, as Ancillary Executor as aforesaid, *Amici Curiae.*

tions and shares of stock of a foreign corporation. These securities were held in New York. They were not used in connection with any business carried on by or for the decedent within the United States.

The Commissioner included these securities in determining the value of the gross estate of the decedent "situated in the United States", and computed and assessed the federal estate tax accordingly.

The Court below held that the Commissioner's construction of the statute was erroneous and that the words "situated in the United States" as used in Section 303(b) of the Revenue Act of 1924 should *not* be construed as intended to include intangible property owned by a nonresident decedent, merely because the certificate or other paper evidencing the ownership thereof, happened to be physically present in the United States at the time of the decedent's death.

ARGUMENT.

I.

It is respectfully submitted that the construction of the statute by the Circuit Court of Appeals is correct.

The subject of the tax is the transmission of property from the dead to the living (*Heiner* v. *Donnan*, 285 U. S. 312, 322). "A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits of a particular state * * *" (*First National Bank* v. *Maine*, 284 U. S. 312, 327; *Baldwin* v. *Missouri*, 281 U. S. 586). Such an event "*in the nature of things*" cannot occur in two or more places at one and the same time (*First National Bank* v. *Maine*, *supra*, at 326, 327).

The statute, to say the least, should not be given a construction which would bring it into conflict with this "fundamental conception" of the common law (*First*

National Bank v. *Maine, supra,* 326), concerning the nature of the transmission of property at death.

In its general provisions, the statute seems *implicitly* to recognize that it is only when the taxable event occurs *within* the United States that it constitutes an appropriate subject of taxation by this country. In the case of a non-resident decedent, it purports to tax transmissions of property *only* when such property is "situated in the United States".

Since, in the case of real estate and tangible personalty the transmission of the property occurs at the place where such property is physically situated, and in the case of intangibles at the place where they are situated *in contemplation of law,* it is clear that the statutory language is at least susceptible of a construction which will bring it into conformity with the ordinary rules of the common law applicable to the subject matter (*State Tax on Foreign-Held Bonds,* 15 Wall. 300; *Union Transit Company* v. *Kentucky,* 199 U. S. 194; *Blodgett* v. *Silberman,* 277 U. S. 1; *The Farmers' Loan and Trust Company* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri, supra; Beidler* v. *South Carolina Tax Commission,* 282 U. S. 1; *First National Bank* v. *Maine, supra*).

At best, therefore, the argument of the petitioner amounts to this, viz., that such a construction is not inevitable and that the general language of the statute is susceptible of another and different construction under which the tax would be extended to transmissions of property that, in contemplation of law, take place in foreign countries.

But under settled rules of statutory construction there are at least, *four* presumptions which would defeat the construction thus urged by the petitioner. These four presumptions are:

First: Where a statute is open to two constructions that construction ought to be preferred which is consonant with the common law (*Rex* v. *Salisbury* (1901)

1 Q. B. 573, 577). Since the common law "constitutes the foundation and primarily the body and soul of our jurisprudence, every statutory enactment is construed by its light and with reference to its cognate principles" (*Lewis'-Sutherland Statutory Construction*, 2d Ed., Vol. II, p. 861).

> "In construing a statute regard must be had to the ordinary rules of law applicable to the subject-matter, and these rules must prevail, except in so far as the statute shows that they are to be disregarded; and the burden of showing that they are to be disregarded rests upon those who seek to maintain that proposition." (*Attorney General* v. *Beech*, (1898) 2 Q. B. 147, 155; 67 L. J. Q. B. 585, 570, per Chitty, L. J.).

Certainly it cannot be doubted that according to the ordinary rules of the common law applicable to the subject matter, the intangibles here involved were situated at the domicile of the deceased, and that it was there, and not in the United States, that their transmission took place upon his death.

The House of Lords in *Thomson* v. *Advocate General* (1845) 12 Cl. & F. 1, 29, in construing the general terms of an English statute imposing a legacy duty on "every legacy given by a will or testamentary instrument of any person", said:

> "If a testator has died out of Great Britain with a domicile abroad, although he may have personal property that is in Great Britain at the time of his death, in contemplation of law that property is supposed to be situated where he was domiciled, and, therefore, it does not come within the act: this seems to be the most reasonable construction to be put upon the Act of Parliament * * *."

Second: General words in a statute are never construed so as to extend to subjects which are beyond the territorial jurisdiction of the legislature.

It seems to us that this was the underlying rule of decision in *Eidman* v. *Martinez,* 184 U. S. 578, in which the identical question here presented arose under the federal succession tax of 1898.

In that case this court said at page 592:

> "We decline to hold the tax involved in this case applicable to this estate *because the words of the statute do not require it, and because the thing taxed, that is, the transmission of the property to the legatees or next of kin, takes place in a foreign country.*" (Italics ours.)

(See also *Thomson* v. *Advocate General, supra,* cited with seeming approval in *Eidman* v. *Martinez, supra; U. S.* v. *Goelet,* 232 U. S. 293, 297; *Maxwell on the Interpretation of Statutes,* p. 169.)

Third: In the interpretation of tax statutes their provisions are not to be extended by implication beyond the clear import of the language used. Doubts, if any, should be resolved in favor of the taxpayer and against the government (*Gould* v. *Gould,* 245 U. S. 151, 153; *United States* v. *Goelet,* 232 U. S. 293; *Eidman* v. *Martinez, supra,* 583; *American Net & Twine Co.* v. *Worthington,* 141 U. S. 468).

Fourth: The general rule is that where there are two possible constructions of a statute one of which will give rise to grave constitutional doubts, and the other of which avoids such doubts, the latter will be adopted (*United States* v. *Bennett,* 232 U. S. 299; *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366; *Carey* v. *South Dakota,* 250 U. S. 118).

Clearly, the petitioner has failed to overcome these presumptions. Even apart from these presumptions, the general character of the statutory provisions suggests that Congress contemplated that they would be supplemented by the ordinary rules of the common law applicable to the subject-matter.

Blackstone v. *Miller*, 188 U. S. 189, and *Wheeler* v. *Sohmer*, 233 U. S. 434, relied on by the petitioner, involved no question of statutory construction. The New York death transfer tax law involved in these cases had been construed by the courts of that State as intended to reach the transfer of the particular intangibles there in question. This court was careful to point out that the State decisions concerning the construction of the statute were, of course, binding upon it (*Blackstone* v. *Miller*, *supra*, 203; *Wheeler* v. *Sohmer*, *supra*, 438), and that the only question presented was whether the statute as so construed violated the Fourteenth Amendment to the Constitution of the United States.

In both cases it was implicitly recognized that the general rule of law was that intangible property was situated at the domicile of the owner (*Blackstone* v. *Miller*, *supra*, 204; *Wheeler* v. *Sohmer*, *supra*, 438).

It is submitted that the petitioner is mistaken in his premise that *Blackstone* v. *Miller*, *supra*, and *Wheeler* v. *Sohmer*, *supra*, effected a change in that general rule.

Those two cases merely dealt with the constitutional power of a State to create by specific statutory enactment a *different* situs for such intangibles.

Manifestly, therefore, *Blackstone* v. *Miller* and *Wheeler* v. *Sohmer* cannot aid the petitioner on the question of statutory construction,—unless they be coupled with the assertion that in construing the general language of this statute Congress must be presumed to have intended to tax everything that it thought it had constitutional power to tax. But it is respectfully submitted that there is no foundation in law for indulging in any such presumption. On the contrary such a presumption would come in direct conflict with the well established principle that in the interpretation of tax statutes their provisions are not to be extended by implication beyond the clear import of the language used, and that all doubts are to be resolved in favor of the taxpayer. *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232,

cited by the petitioner, manifestly did not intend to overturn that rule. That case merely involved an asserted *exemption* which did violence to the express terms of the statute.

The fact that there is a provision in the statute specifically creating a second situs in the case of stock of an American corporation in conflict with the ordinary rule of the common law governing the situs of intangibles, is scarcely favorable to the petitioner's contention, in view of the well-established maxim of statutory construction *expressio unius est exclusio alterius.* While the petitioner suggests a possible explanation for the inclusion of this specific provision concerning American stocks, we submit that the explanation at most merely counterbalances the unfavorable effect of the legal maxim referred to.

The same is true as regards those particular provisions of the statute specifically dealing with the proceeds of insurance and moneys on deposit with bankers. In these instances, the statutory rule declared is in accord with the ordinary legal rule governing the situs of intangibles. In dealing with the last mentioned specific provisions of the statute, the petitioner himself apparently invokes the maxim *expressio unius est exclusio alterius.* But as pointed out by the Court below, the inclusion of these specific statutory declarations is readily explainable. In the case of proceeds of life insurance policies, this explanation is to be found in the history of the statutory provisions involved, and in the case of money on deposit with bankers in the importance from the viewpoint of international trade and finance of having such an express declaration incorporated in the statute.

Therefore, looking at the matter in the light most favorable to the petitioner's contention, it would seem that the most that fairly can be claimed by him is that an examination of these specific statutory provisions in search of

the Congressional intent, yields no satisfactory results. Thus we must revert again to the general provisions and to the general presumptions applicable to their construction.

As to the Commissioner's argument based upon the departmental regulations, it may be conceded that where such regulations pertain to a purely administrative matter, the subsequent enactment of a statute by Congress, in substantially similar terms to those contained in the prior statutes under which the regulations were promulgated, fairly may be considered as an implied statutory confirmation of such regulations. So in *National Lead Company* v. *United States*, 252 U. S. 140, and *Brewster* v. *Gage*, 280 U. S. 327, relied on by the petitioner, the matter in question was purely of an administrative character. In the former case the question was as to the correct method of computing the amount of a "draw-back" granted by the statute in connection with certain import duties, and in the latter case, the question concerned the method of computing the amount of the gain or loss under the income tax law where the property had been acquired by the taxpayer under a will. But in the case at bar, the question involved is of a much more fundamental character. It concerns the determination of the very subject of the tax itself. It seems to us that a distinction should be drawn between those subject matters that are appropriately within the sphere of administrative regulation, and those that concern the very substance of the law itself, and which can only be appropriately dealt with by the judiciary (*U. S.* v. *United Verde Copper Co.*, 196 U. S. 207, 215).

Moreover, in our view the regulation in question was at variance with the judicial decisions governing the situs of intangible property. It is submitted that the general rules of the common law governing the situs of intangibles were the same at the time the regulation was promulgated as they are today. *Blackstone* v. *Miller* and

Wheeler v. *Sohmer* did not change these rules. They dealt with constitutional questions only. Thus, in so far as the regulation in question was in conflict with the rules of law it was invalid, and manifestly the re-enactment of the statute should not be deemed an implied statutory confirmation of an *invalid* regulation. Finally, in the present instance, the administrative construction of the statute was not in all respects uniform and consistent (*Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1; *Shenton* v. *U. S.*, 53 Fed. (2nd) 249, 250). Stock of a foreign corporation was not included in the earlier regulations (Petitioner's Brief, p. 13).

DeGanay v. *Lederer*, 250 U. S. 376, relied on by the petitioner is, we submit, clearly distinguishable. In that case, the securities were held in this country by an agent under a power of attorney which authorized him:

> "To sell, assign, transfer any stocks, bonds, loans, or other securities now standing or that may hereafter stand in my name on the books of any and all corporations, national, state, municipal or private, to enter satisfaction upon the record of any indenture or mortgage now or hereafter in my name, or to sell and assign the same and to transfer policies of insurance, and the proceeds, also any other moneys to invest and reinvest in such securities as they may in their discretion deem safe and judicious to hold for my account; to collect and receipt for all interest and dividends, loans, stocks, or other securities now or hereafter belonging to me, to endorse checks payable to my order and to make or enter into any agreement or agreements they may deem necessary and best for my interest *in the management of my business and affairs* * * * ".

The Court found that the securities had become "completely localized in the United States". It held that, "*Thus* situated and held, and *with the authority given to*

the local agent over them, we think the income derived is clearly from property within the United States within the meaning of Congress as expressed in the statute under consideration". The case involved an income tax which of course differs materially from an estate tax, and this Court was careful to point out that "the question certified is *limited* to the net income collected *by virtue of the power of attorney* * * * " (See page 379).

It is therefore submitted that the above mentioned presumptions should control the construction of the statute.

II.

In view of recent decisions of this Court (*The Farmers' Loan and Trust Company* v. *Minnesota, Baldwin* v. *Missouri, Beidler* v. *South Carolina Tax Commission, First National Bank* v. *Maine*, all *supra*), it would seem indisputable that the construction contended for by the petitioner would at least give rise to serious doubts concerning the constitutional validity of the statute. These decisions, we submit, may not be dismissed with the simple statement that they only involved questions of double taxation as between States of the Union, and are not applicable to the Federal Government. It is true that one of the reasons suggested by the Court in *The Farmers' Loan and Trust Company* case, *supra*, for preventing double taxation of intangibles, was the desirability of eliminating discord among the several States. However, the legal principles which the court expounded in the said case and in the succeeding cases of the same series, and particularly in the last case of the series, *First National Bank* v. *Maine, supra*, may not be confined within any such narrow limits. They concern the inherent nature and essential character of a transmission of property from the dead to the living. That essen-

tial nature and character, of course, is in no way dependent upon the relations between the States; neither is it dependent on whether the transaction is sought to be taxed by a State or the Federal Government. It is wholly independent of all such considerations for it is based upon legal principles of ancient origin, and necessarily results from fundamental legal conceptions.

In the *First National Bank* v. *Maine, supra,* this Court said that, "A transfer from the dead to the living of any specific property is an event *single in character* and is effected under the laws, and occurs within the limits, of a particular state * * *" (p. 327). It said further, that it is a "* * * *fundamental conception* that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which *cannot* take place in two or more states at one and the same time" (p. 326). And again (p. 327) that such a transmission, "*in the nature of things*" can take place in one place *only.* The Court further said:

> "In respect of tangible property, the opposite view must be rejected as connoting a *physical impossibility;* in the case of intangible property, it must be rejected as involving an *inherent and logical self-contradiction*" (p. 326).

And finally:

> "Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state, carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there" (pp. 326-7).

Having decided that the transfer of property at death necessarily must take place in one jurisdiction only, and not in two or more, this Court then went on to determine the particular jurisdiction wherein such transfer actually

occurs. It held that in the case of corporeal or tangible property the transfer actually occurs in the place where the property is physically present. In the case of intangible or incorporeal property it held that the transfer actually takes place at the domicile of the decedent. Accordingly, it could take place nowhere else.

True it is that in the one case, viz., that of corporeal property, the legal conclusion rests upon a physical fact; and in the other case, viz., that of intangible or incorporeal property, the legal conclusion is based upon a legal maxim of ancient origin, viz., *mobilia sequuntur personam*, coupled with the obvious logical conclusion that since a thing cannot be in two places at one and the same time, "a determination fixing the local situs of a thing for the purpose of transferring it in one state, carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there." But clearly the binding effect of the resulting legal conclusion must be the same in both cases.

Manifestly, therefore, in so far as the decisions in question describe the legal nature of transmissions of property from the dead to the living, they must be applicable, regardless of the particular taxable entity seeking to subject such a transmission to tax.

The only question that can arise is whether the Federal power of taxation unlike the power of taxation possessed by the States, may extend to a transmission of property which actually occurs outside of the United States. In other words, is the Federal power of taxation limited to subjects within its jurisdiction, or is this limitation confined to the States?

In *State Tax on Foreign-Held Bonds*, 15 Wall. 300, this Court said at page 319 that the power of taxation, however vast in its character and searching in its extent, is *necessarily* limited to subjects within the jurisdiction of the state. It is true that the court was discussing the power of taxation of the several States, but it seems in-

credible that such an inherent limitation upon the power of taxation itself should not also be applicable to the Federal Government.

In *United States* v. *Erie Railroad*, 25 Fed. Cas. 1019 (reversed on other grounds in 106 U. S. 327), Chief Justice Waite said at p. 1021:

> "The power of the United States is limited to persons, property and business within their jurisdiction, as much as that of a state is limited to the same subjects within its jurisdiction."

In *Frick* v. *Pennsylvania*, 268 U. S. 473, this Court said that for a State to impose a tax without jurisdiction of the subject matter was "mere *extortion* and in contravention of due process of law." Certainly it is no longer an open question in this Court that the Fifth Amendment to the Constitution is a limitation upon the exercise of the Federal taxing power, and that it prevents extortion and confiscation under the guise of taxation (*Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Heiner* v. *Donnan*, 285 U. S. 312).

But furthermore, this Court has repeatedly held that the restraints imposed upon Congress by virtue of the due process clause of the Fifth Amendment are identical with those imposed upon the several States by virtue of the same clause in the Fourteenth Amendment (*Heiner* v. *Donnan, supra*, 326; *French* v. *Asphalt Paving Co.*, 181 U. S. 324, 329; *Twining* v. *New Jersey*, 211 U. S. 78, 101; 3 *Willoughby on the Constitution of the United States*, p. 1682; *Taylor on Due Process of Law*, p. 243).

Therefore, it is difficult to see why *The Farmers' Loan and Trust Company* case, and other cases of the same series, should not be as decisive of the constitutional question involved here as they are of the general principles of law governing the *situs* of intangibles and the nature and character of transmissions of property at death.

United States v. *Bennett*, 232 U. S. 299, and *Cook* v. *Tait*, 265 U. S. 47, cited by the petitioner, are readily distinguishable. Unquestionably, the Federal Government has an international aspect which the States have abdicated, and which enables it to impose a tax upon the basis of *citizenship*, where a similar exaction by one of the constituent States could not be constitutionally upheld.

But the tax that we are here considering does not purport in any way to be based upon citizenship or nationality. Citizenship or nationality is not mentioned, —a silence that becomes doubly significant when we observe that in another part of the same act, viz., that dealing with the income tax law, *that* tax is specifically imposed on the basis of citizenship in the case of American citizens residing abroad.

Taxes of he type here involved, rest upon the power of the state imposing them, to control the privilege of succession, and unless the transmission of the property at death occurs within the jurisdiction of a given state there is wanting on the part of such State any real taxable relationship to the event which is the subject of the tax (*First National Bank* v. *Maine*, *supra*, 329).

Moreover, the decedent here was an alien, viz., a subject of the King of England. Therefore, his nationality would in no event furnish a basis for the tax. As an alien friend, he is entitled to the protection of the Fifth Amendment to the Federal Constitution. This Court has so held in the case of expropriation of property under the power of eminent domain (*Russian Fleet* v. *United States*, 282 U. S. 481, 489). The same rule would seem to apply to a case where such property is sought to be *confiscated* under the guise of taxation (*Frick* v. *Pennsylvania*, 268 U. S. 473, 492; *Nichols* v. *Coolidge*, 274 U. S. 531, 542).

It is therefore submitted that the question of the constitutional validity of the statute if construed in accord-

ance with the petitioner's contention, is at least sufficiently serious to require the rejection of that construction.

Respectfully submitted,

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